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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, JOHN STURDIVANT, GLEN PETERSON, HARRY DAWSON, JERRY BLACK, ALEJANDRO GONZALES,
Petitioners,

v.

RAMIRO MARTINEZ,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court below improperly departed from the rule established by this Court, and adopted by the overwhelming majority of circuit and state courts, that the Civil Service Reform Act provides the exclusive remedial scheme for federal employee claims arising under the Act?

PARTY TO THE PROCEEDINGS

In addition to the parties named in the caption, Robert M. Guttman, as Assistant Secretary for Labor-Management Standards, United States Department of Labor, was Intervenor-Appellee in the court of appeals, and Intervenor-Defendant in the district court proceedings.

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PETITION FOR A WRIT OF CERTIORARI

The American Federation of Government Employees, AFL-CIO, ("AFGE"), John Sturdivant, Glen Peterson, Harry Dawson, Jerry Black, and Alejandro Gonzales petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 980 F.2d 2039. The opinion of the district court is set forth at App., *infra*, 9a-13a.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1993. This petition for a writ of certiorari was filed on April 12, 1993, within 90 days of the date of the entry of judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. Relevant provisions of the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111 (1978) ("CSRA" or "Act"), codified throughout title 5 of the U.S. Code, are contained in Title VII, known as the Federal Service Labor-Management Relations Statute ("FSLMRS"), 5 U.S.C. § 7101 *et seq.* 5 U.S.C. § 7120 mandates that labor organizations in the federal sector establish standards of conduct providing for

> (1) the maintenance of democratic procedures and practices including provisions for periodic elections to be conducted subject to recognized safeguards and provisions defining and securing the right of individual members to participate in the affairs of the organization, to receive fair and equal treatment under the governing rules of the organization, and to receive fair process in disciplinary proceedings. . . .

5 U.S.C. § 7120(a)(1). 5 U.S.C. § 7120(d) goes on to state that

> (d) The Assistant Secretary [of Labor] shall prescribe such regulations as are necessary to carry out the purposes of this section . . . . Complaints of violations of this section shall be filed with the Assistant Secretary. In any matter arising under this section, the Assistant Secretary may require a labor organization to cease and desist from violating this section and require it to take such actions as he considers appropriate to carry out the policies of this section.

2. The Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401 *et seq.* ("LMRDA") provides in relevant part:

> No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined . . . unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

29 U.S.C. § 411(a)(5). 29 U.S.C. § 412 states that

> [a]ny person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States. . . .

STATEMENT OF THE CASE

This case involves a federal sector labor dispute arising out of misconduct by, and irregularities in the election of, a federal employee local president. At the time of this action, Ramiro Martinez was a civilian employee of the United States Department of the Air Force at Kelly Air Force Base in San Antonio, Texas. He was also president of AFGE Local 1617, the exclusive representative for federal employees in recognized bargaining units at Kelly. App., *infra*, 2a. The bargaining units represented by Local 1617 consist entirely of federal employees. *Id.* Local 1617 is chartered by AFGE, a federation composed of over one thousand local labor organizations representing some 700,000 federal employees. *Id.*

On January 3, 1989, AFGE National Vice President Glen Peterson ordered an investigation of allegations that Martinez sold a list of names and addresses of Local 1617 members to an insurance company. App., *infra*, 3a. Pursuant to this investigation, AFGE National President John Sturdivant found probable cause to believe that Martinez had violated the local and national constitutions and therefore initiated disciplinary proceedings against him. *Id.* Believing that the local could not conduct a fair and impartial trial of these charges, Sturdivant appointed a trial committee composed of other union officers having no affiliation with Local 1617: Harry Dawson, Jerry Black, and Alejandro Gonzales. *Id.*

After a hearing at which Martinez was represented by counsel and permitted to present evidence on his behalf (Record on appeal ("R.") 49, 692-694), the trial committee concluded that Martinez improperly sold the membership list. App., *infra*, 3a. It recommended that Sturdivant remove him as local president and bar him from holding union office for a period of three years. *Id.* Adopting the committee's decision, Sturdivant notified Martinez on August 24, 1989, that the removal and bar would be effective immediately. *Id.* Martinez did not appeal this decision through the procedures available to him under the AFGE National Constitution (R. 697).

While the union was conducting its investigation of Martinez' misconduct, Local 1617 held its election at which Martinez was reelected local president. App., *infra*, 3a. Six unsuccessful candidates for office subsequently filed an election protest with Local 1617's election committee alleging, *inter alia*, that they were denied access to the Local's newspaper while other candidates were accorded such coverage. *Id.* The committee dismissed the protest. *Id.* Two of the protesters appealed the dismissal to NVP Peterson who ordered an investigation. *Id.* The probe revealed that the incumbent officers, including Martinez, improperly used local funds to promote their election. In response to these findings, Peterson ordered a new election. *Id.* After unsuccessfully appealing the decision to Sturdivant, Martinez challenged the election ruling before the Department of Labor. *Id.* After conducting its own investigation, the Labor Department dismissed his complaint. App., *infra*, 4a. Martinez appealed the dismissal to the Assistant Secretary for Labor-Management Standards, who after careful review, upheld the dismissal. App., *infra*, 10a.

2. Proceedings Below

In September 1989, while his complaint was still pending before the Labor Department, Martinez filed suit in

federal district court against AFGE, John Sturdivant, Glen Peterson and the three members of the trial committee, alleging impropriety in the disciplinary and election proceedings. App., *infra*, 4a. The defendants quickly moved to dismiss the case for lack of subject matter jurisdiction on the grounds that the CSRA provided the exclusive remedy for Martinez' claims. The district court agreed. App., *infra*, 13a.

On appeal, however, the Fifth Circuit refused to consider whether the CSRA's comprehensive remedial scheme applied to, much less governed, Martinez' cause of action. App., *infra*, 5a. Despite the fact that this case involves a federal employee's conduct as president of a purely federal sector local, the court of appeals held that "the only question before us is whether the LMRDA grants subject matter jurisdiction" and "not whether the CSRA provides a remedy." *Id.*, fn.2. It thereafter remanded [1] the case for further proceedings on the question of AFGE's status as a "mixed union," i.e., one representing both public and private sector employees, to determine whether Martinez could maintain his action in federal district court under the LMRDA. App., *infra*, 7a-8a.

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[1] That the decision at bar involves a remand should not deter the Court from granting this petition. The jurisdictional issue here has broad ramifications for the integrity of the statutory remedies for federal employment claims. Previously, the Court has granted certiorari to review similar judgments remanding a case for trial when it involves an important question of law that is fundamental to the further conduct of the case and would otherwise qualify as a basis for certiorari. *See United States v. General Motors Corporation*, 323 U.S. 373, 377 (1945); *Gillespie v. United States Steel Corporation*, 379 U.S. 148, 153 (1964). Specifically, it has consented to review decisions raising significant jurisdictional questions, such as here, when the court of appeals had reversed the granting of a motion to dismiss and ordered the case remanded for trial. *See Land v. Dollar*, 330 U.S. 731, 734, n.2 (1947); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685, n.3, *reh'g denied*, 330 U.S. 840 (1949).

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the exclusivity of the remedies prescribed by Congress in the Civil Service Reform Act. The Act represents a carefully designed congressional effort to provide a comprehensive mechanism for resolving federal sector labor disputes. The Fifth Circuit's refusal to resolve the labor dispute at issue here within this statutory framework is at odds with the clear precedent of this Court and conflicts with the approach adopted by nearly every other circuit addressing similar federal employee claims. Moreover, by allowing federal employees to bring their labor related claims into district court, the court of appeals has seriously subverted the statutory scheme for resolution of such disputes. Review by this Court is therefore warranted.

1. The Civil Service Reform Act of 1978 "comprehensively overhauled the civil service system." *Lindahl v. OPM*, 470 U.S. 768, 773 (1985). Its leading purpose was "to replace the haphazard arrangements for administrative and judicial review" of federal employment matters with an "integrated scheme" of review. *United States v. Fausto*, 484 U.S. 439, 445-446, *reh'g denied*, 485 U.S. 972 (1988). Title VII of the CSRA is an important part of this highly complex and subtle statutory scheme of federal personnel management. Indeed, it is the "controlling authority" for labor relations in the federal government. *Karahalios v. National Federation of Federal Employees Local 1263*, —— U.S. ——, 109 S.Ct. 1282, 1285 (1989). Consequently, a court should look to these controlling provisions in the first instance when a federal employee brings the type of labor-related claims alleged here.

It is beyond dispute that Martinez' claims come within the scope of the CSRA. As a civilian employee of the Air Force, Martinez was an "employee" within the meaning of 5 U.S.C. § 7103(a)(2) whose "rights and obligations,"

vis-a-vis collective bargaining and organized labor, Congress ordained through enactment of Title VII. 5 U.S.C. § 7101(b). The allegations of impropriety in the union's disciplinary proceedings and decision to set-aside the local's election fall squarely within the scope of 5 U.S.C. § 7120. That provision establishes standards of conduct for labor organizations,[2] requiring that they conduct fair elections, protect a member's right to participate in their affairs, and ensure fair disciplinary proceedings. The remedy for violations of the standards of conduct is set forth in § 7120(d), which provides that complaints alleging such violations shall be filed with the Assistant Secretary. 5 U.S.C. § 7120(d).

Alternatively, Martinez' claims could be characterized as stating violations of his right under 5 U.S.C. § 7102 "to form, join, or assist any labor organization . . . freely and without fear of penalty or reprisal [including] the right to act for a labor organization in the capacity of representative." The Act makes it an unfair labor practice for a union to interfere with an employee's exercise of his rights under the chapter, or otherwise fail or refuse to comply with any of its provisions. 5 U.S.C. § 7116(b)(1) and (8). Thus, he could have brought such charges to the Federal Labor Relations Authority ("FLRA") which possesses exclusive jurisdiction over unfair labor practices. 5 U.S.C. § 7118. *See Karahalios v. NFFE, Local 1263*, *supra*, 109 S.Ct. at 1287.

2. The most persistent object of this Court's attention with regard to the CSRA is the exclusivity of its comprehensive remedial scheme. In *Bush v. Lucas*, 462 U.S. 367 (1983), a federal employee instituted a *Bivens* action against his supervisor for violation of his First

[2] Both AFGE, AFL-CIO and Local 1617 are "labor organizations" within the meaning of the Act which defines that term as "an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an agency concerning grievance and conditions of employment, ..." 5 U.S.C. § 7103(a)(4).

Amendment rights. The Court faced for the first time the question whether the "elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue." Finding the comprehensive nature of the statutory remedies to be a "special factor counselling hesitation," the Court refused to create a judicial remedy for the constitutional violation. *Id.*

This Court's adherence to the principle of exclusivity was again demonstrated in *United States v. Fausto*, *supra*, 484 U.S. at 443-45, where it addressed the question of whether a previous means of obtaining judicial review of federal personnel actions under the Tucker Act, 28 U.S.C. § 1491, was still viable under the CSRA. The Court held that the CSRA's "integrated scheme of administrative and judicial review" foreclosed Claims Court review of federal personnel actions pursuant to its jursidiction under the Tucker Act to hear Back Pay Act claims.

More recently, the Court held that a federal employee could not sue his union for breach of the duty of fair representation. *Karahalios v. NFFE, Local 1263*, *supra*, 109 S.Ct. 1282. Refusing to imply a private cause of action from the fair representation provision at 5 U.S.C. § 7114(a)(1), the Court noted that " '. . . where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies.' " *Id.* at 1286 [citation omitted]. Absent " 'strong indicia of contrary congressional intent,' " it would conclude " 'that Congress provided precisely the remedies it considered appropriate.' " *Id.* [citation omitted]. Since the duty of fair representation was "expressly recognized in the Act, and an administrative remedy for its breach [] expressly provided for before the FLRA. . . ," a federal employee had no private cause of action to enforce it. *Id.* at 1287. The Court believed that holding otherwise "would seriously undermine [] the congressional scheme. . . ." *Id.* at 1288.

3. This Court's steadfast commitment to the CSRA's remedial scheme has led one jurist to characterize it as "jealously guard[ing] the CSRA against inconcinnous judicial incursions." *Montplaisir v. Leighton*, 875 F.2d 1, 3 (1st Cir. 1989). Its unwavering focus on the CSRA's regulatory mechanism has led to the overwhelming consensus among the circuits that the CSRA's legislative purpose "was to channel grievances and disputes arising out of government employment into a single system of administrative procedures and remedies." *Rivera v. United States*, 924 F.2d 948, 951 (9th Cir. 1991). Thus, in "a variety of settings, they have followed the Court's lead and treated [the] CSRA as establishing the sole mechanism for resolving labor conflicts in the federal arena." *Montplaisir, supra*, 875 F.2d at 3.[3]

For instance, eleven circuits have held that the CSRA precludes jurisdiction over constitutional tort claims brought by federal employees involving job-related matters. *See Pinar v. Dole*, 747 F.2d 899, 909 (4th Cir. 1984) *cert. denied*, 471 U.S. 1016 (1985); *Rollins v. Marsh*, 937 F.2d 134, 139 (5th Cir. 1991); *Jones v. Tennessee Valley Authority*, 948 F.2d 258, 262-64 (6th Cir. 1991); *Feit v. Ward*, 886 F.2d 848, 854-56 (7th Cir. 1989); *McIntosh v. Turner*, 861 F.2d 524, 525 (8th Cir. 1988); *Saul v. United States*, 928 F.2d 829, 836-840 (9th Cir. 1991); *Petrini v. Howard*, 918 F.2d 1482, 1484 (10th

[3] Similarly, state courts have refused to exercise jurisdiction over federal labor relations matters. In *Ramos v. AFGE*, 693 S.W.2d 485 (Tx. 1985), the court refused to entertain a complaint by Local 1617 challenging AFGE's imposition of trusteeship under 5 U.S.C. § 7120 on the grounds that Congress entrusted exclusive jurisdiction over such matters to the Assistant Secretary. The highest courts in three states have held that the statutory unfair labor practice procedures for remedying a breach of the duty of fair representation under 5 U.S.C. § 7114(a)(1) preempted state tort claims against the union. *See Mims v. American Federation of Government Employees*, 531 So.2d 661 (Ala. 1988); *DeGrio v. AFGE*, 484 So.2d 1, 3-4 (Fla. 1986); *Wood v. AFGE*, 318 So.2d 568, 569-70 (S.C. 1984).

Cir. 1990); *Stephens v. Department of Health and Human Services ("HHS")*, 901 F.2d 1571, 1577 (11th Cir.) *cert. denied*, —— U.S. ——, 111 S.Ct. 555 (1990); *Spagnola v. Mathis*, 859 F.2d 223, 230 (D.C.Cir. 1988) (en banc) (per curiam); *Volk v. Hobson*, 866 F.2d 1398, 1403-04 (Fed. Cir.), *cert. denied*, 490 U.S. 1092 (1989); *Accord Berrios v. Department of Army*, 884 F.2d 28, 30-31 (1st Cir. 1989).

At least four circuits have viewed the CSRA as "sufficiently comprehensive to make reasonable the presumption that Congress intended to leave no room for state law" and therefore held that the Act preempts state-law claims arising from conduct actionable under the federal scheme. *Petrini v. Howard*, *supra*, 918 F.2d at 1484 (10th Cir.) [citation omitted] (defamation and intentional infliction of emotional distress). *See also Roth v. United States*, 952 F.2d 611, 614-616 (1st Cir. 1991) (defamation); *Saul v. U.S.*, *supra*, 928 F.2d at 842 (9th Cir.) (defamation and intentional infliction of emotional distress); *Broughton v. Courtney*, 861 F.2d 639, 644 (11th Cir. 1988) (tortious interference with employment). The Act's preemption even precludes malpractice suits by federal employees against union attorneys for negligent representation. *Montplaisir v. Leighton*, *supra*, 875 F.2d at 4.

Of particular relevance here are the appellate decisions recognizing the Act's preemption of causes of action arising under other federal statutes. For example, courts have held that the CSRA preempts review of federal personnel actions under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, even when such review was available prior to the Act's passage. *See McAuliffe v. Rice*, 966 F.2d 979, 980-81 (5th Cir. 1992) (CSRA precludes APA review of employee's discharge from nonappropriated fund instrumentality); *Ryon v. O'Neill*, 894 F.2d 199, 200 (6th Cir. 1990) (CSRA precludes APA and mandamus review of employee's claim

that reassignment constituted prohibited discriminaton on the basis of marital status); *Stephens v. HHS*, *supra*, 901 F.2d at 1575 (CSRA precludes APA and mandamus review of preference-eligible exempt employee's challenge to denial of promotion).

Similarly, the Act precludes suits by federal employees under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), ("FTCA") for injuries arising out of their employment. *See Premachandra v. United States*, 739 F.2d 392 (8th Cir. 1984) (No jurisdiction over federal employee's claims under FTCA for mental anguish and economic losses suffered upon discharge); *Rivera v. United States*, 924 F.2d 948, 952 (9th Cir. 1991) (CSRA precludes suit under FTCA for retaliatory harassment); *American Postal Workers Union v. U.S. Postal Service*, 940 F.2d 704, 708 (D.C. Cir. 1991) (CSRA preempts claim under FTCA for retaliatory discharge). In addition, when the CSRA otherwise precludes review, a court is divested of its jurisdiction under the Privacy Act, 5 U.S.C., § 552a. *Henderson v. Social Security Administration*, 908 F.2d 559, 561 (10th Cir. 1990).

In fact, the preemptive effect of the CSRA reaches federal statutes which otherwise expressly authorize suits by federal employees. *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir.) (en banc), *cert. denied*, —— U.S. ——, 111 S.Ct. 46 (1990). In the Fair Labor Standards Act ("FLSA"), Congress specifically granted federal employees the right to sue for overtime pay claims. 29 U.S.C. §§ 203, 216. While recognizing this fact, the Federal Circuit nevertheless held that the grievance procedures prescribed in 5 U.S.C. § 7121 preempted FLSA jurisdiction if the federal employee is subject to a collective bargaining agreement which does not expressly exclude overtime claims from its coverage. *Id.* at 1454-58.[4]

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[4] Only one post-*Fausto* case which squarely addresses the CSRA preemption argument declined to accord it that effect. In *United States v. Lund*, 853 F.2d 242, 247 (4th Cir. 1988), the Fourth Cir-

4. The Fifth Circuit considered the CSRA's labor relations provisions irrelevant to this case, stating that "the question is not whether the CSRA provides a remedy, but whether the LMRDA provides one." App., *infra*, 5a, n.2. In doing so, it blatantly disobeyed this Court's instruction to view Title VII as the "controlling authority" in the area of federal sector labor relations. *Karahalios v. NFFE Local 1263*, *supra*, 109 S.Ct. at 1285. Its summary dismissal of the CSRA bespeaks such judicial disregard for Congress' plan for federal sector labor relations as to threaten the primacy of the statutory design. By opening the door to judicial review of these claims, the court seriously undermines the congressional scheme for enforcement of union standards of conduct and employee rights under the Act. *See Bush v. Lucas*, *supra*, 462 U.S. at 388; *United States v. Fausto*, *supra*, 484 U.S. at 443-45; *Karahalios v. NFFE, Local 1263*, *supra*, 109 S.Ct. at 1286-88.

The Fifth Circuit's decision allowed Martinez to circumvent the congressionally mandated remedies for violations of 5 U.S.C. § 7120(d) and § 7102 by couching his complaint in terms of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 *et seq.*, as amended. The LMRDA excludes Martinez' claims, however. It permits a civil action by "any person whose rights secured by the provisions of this subchapter have been infringed. . . ." 29 U.S.C. § 412. The rights secured by the subchapter are those enjoyed by members of "labor organizations," as defined in 29 U.S.C. § 402, and include

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cuit held that the civil provisions of the Act making nepotism a prohibited personnel practice subject to the Special Counsel's jurisdiction did not preclude criminal prosecution under the conflict of interest statute, 18 U.S.C. § 208. That case, however, did not involve a federal employee's right to pursue various avenues of relief, such as is at issue here, but rather "whether the CSRA's scheme of civil penalties for forbidden personnel practices has implicitly repealed the *government's* right to pursue criminal remedies. . . ." *Id.* at 248.

equal voting rights, freedom of assembly and speech, and a guarantee of due process in the union's disciplinary proceedings. 29 U.S.C. § 411. A "labor organization" for purposes of § 411 is one "engaged in an industry affecting commerce . . . which exist[] for the purpose in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours . . . ." 29 U.S.C. § 402(i). The term "[e]mployer means any employer or any group or association of employers engaged in an industry affecting commerce . . . *but does not include the United States* or any corporation wholly owned by the Government of the United States or any State or political subdivision thereof." 29 U.S.C. § 402(f) [emphasis supplied].

Here, the United States is the "employer." The "person" aggrieved is a *federal* employee. The "labor organization" whose office he sought and from which he derives his rights as a member is Local 1617, which solely represents federal employees. It is, therefore, incongruous to view the LMRDA, and not the CSRA, as governing this case. The court apparently believed such a result was, nevertheless, warranted under *Hester v. International Union of Operating Engineers*, 818 F.2d 1537 (11th Cir. 1987), *vacated on other grounds and remanded, International Union of Operating Engineers v. Hester*, 488 U.S. 1025 (1989).[5] App., *infra*, 7a, n.4. In that case, the Eleventh Circuit held that the operative issue with regard to LMRDA jurisdiction was not whether the statute covered the employer but whether the LMRDA covered the relevant labor organization. *Id.* at 1540. Citing a pre-CSRA decision that dealt with nonfederal public employees, it construed the LMRDA as applying to "mixed"

[5] The Supreme Court remanded the case for reconsideration in light of another decision dealing with the statute of limitations. On remand, the Eleventh Circuit reaffirmed its holding with regard to LMRDA subject matter jurisdiction on the grounds that the Court had not addressed the issue. *Hester v. International Union of Operating Engineers*, 878 F.2d 1309, 1310 (11th Cir. 1989).

unions which represent both private and public sector employees. *Id.* at 1541. It concluded that jurisdiction would lie after finding that Hester's local and international unions represented private sector employees and were thus subject to the Act. *Id.* at 1542-43.[6]

The *Hester* case was decided prior to this Court's rulings in *United States v. Fausto* and *Karahalios*. Those cases have so changed the landscape in the judicial treatment of federal employee job-related claims (*see* discussion *supra*) as to render suspect a pre-*Fausto* decision such as *Hester* finding district court jurisdiction over such claims. Neither the *Hester* court nor the Fifth Cir-

[6] Prior to the case at bar, no other appellate court affirmatively embraced the approach taken by the Eleventh Circuit. Notwithstanding the court's citation (app., *infra*, 7a), *Berardi v. Swanson Memorial Lodge No. 48*, 920 F.2d 198 (3rd Cir. 1990) involved a retired state police officer and thus is inapposite to the question of the availability of LMRDA jurisdiction to federal employees subject to the Civil Service Reform Act. The Second Circuit affirmed in an unpublished opinion a district court decision which relies on *Hester* in holding that a Veterans Administration employee whose international and local unions represented private sector employees could bring an action under the LMRDA. *See Laity v. Beatty*, 766 F. Supp. 92, 97-98 (W.D.N.Y. 1991), *aff'd* 956 F.2d 1160 (2d Cir. 1992) (unpublished). There, the district court relied on a pre-CSRA case as support for extending the LMRDA's coverage to the federal employee. In any event, this case is distinguishable from *Laity* insofar as here, Local 1617 represents only federal employees.

Even if *Hester* was the appropriate framework for deciding this case, the Fifth Circuit nevertheless erred in refusing to see that jurisdiction would be precluded by the fact that all of Martinez' claims involve matters concerning AFGE Local 1617 which exclusively represents federal employees. *Hester*, *supra*, 818 F.2d at 1541. In addition, even if Martinez' complaint is cognizable under the LMRDA, "the exclusivity provision included in § 403 of Title IV [29 U.S.C. § 483] plainly bars Title I relief when an individual union member challenges the validity of an election that has already been completed." *See Local No. 82, Furniture & Piano Moving v. Crowley*, 467 U.S. 526, 541, *reh'g denied*, 468 U.S. 1224 (1984). Thus, he could not, even under *Hester*, maintain his cause of action involving the decision to set-aside Local 1617's election.

cuit here analyzed whether the CSRA *preempted* jurisdiction over such claims. Had the Fifth Circuit employed the proper *preemption* analysis adopted by numerous other circuits, it would have had to conclude that the remedies embodied in the CSRA preclude judicial review of Martinez' claims under the LMRDA. *See e.g., Carter v. Gibbs, supra*, 909 F.2d 1452; *Premachandra v. United States, supra*, 739 F.2d 392; *Rivera v. United States, supra*, 924 F.2d at 952; *APWU v. U.S.P.S., supra*, 940 F.2d at 708; *Henderson v. Social Security Administration, supra*, 908 F.2d at 561; *McAuliffe v. Rice, supra*, 966 F.2d at 981; *Ryon v. O'Neill, supra*, 894 F.2d at 200; *Stephens v. HHS, supra*, 901 F.2d at 1575.

The CSRA's "integrated scheme of administrative and judicial review" forecloses any assertion that Congress intended to preserve, if one ever existed, a private cause of action in federal district court[7] under the LMRDA for federal employees alleging violations of standards of conduct or unfair labor practices. *Cf. United States v. Fausto, supra*, 484 U.S. at 445; *Karahalios, supra*, 109 S.Ct. at 1286-88. The CSRA clearly dictates that complaints alleging violations of the standards of conduct "*shall* be filed with the Assistant Secretary." 5 U.S.C.

[7] In fact, the CSRA carves out a very narrow role for the federal judiciary. The judicial review provision at 5 U.S.C. § 7123 empowers federal courts to act in only three instances: "Persons aggrieved by a final FLRA order may seek review in the appropriate court of appeals, § 7123(a); the FLRA may seek judicial enforcement of its orders, § 7123(b); and temporary injunctive relief is available to the FLRA to assist it in the discharge of its duties. § 7123(d)." The only reference to district court jurisdiction at 5 U.S.C. § 7123(d) authorizes *the FLRA* to seek temporary injunctive relief in federal district court following issuance of an unfair labor practice complaint by the FLRA General Counsel. Moreover, courts did not enforce standards of conduct or adjudicate unfair labor practice charges under the pre-Civil Service Reform Act regulatory scheme. Consequently, "there was not in this context any pre-existing judicial role that at least arguably Congress intended to preserve." *Karahalios v. NFFE, supra*, 109 S.Ct. at 1288.

§ 7120 (d) (emphasis added). To the extent that Martinez' claims might also be viewed as unfair labor practices, the FLRA has exclusive jurisdiction. 5 U.S.C. § 7118; *Karahalios, supra*, 109 S.Ct. 1282.

Applying well-established principles of statutory construction, it is clear that if § 412 of the LMRDA ever encompassed federal employee claims, the CSRA's specific remedial mandate narrowly tailored to the arena of federal employment implicitly repealed it. *Cf. APWU v. U.S.P.S., supra*, 940 F.2d at 708 ("Residual statute like FTCA cannot co-exist with [the CSRA's] comprehensive employment relations scheme"); *Harris v. United States*, 841 F.2d 1097, 1101 (Fed. Cir. 1988) (CSRA repeals by implication Tucker Act jurisdiction over federal employee claims for environmental differential pay); *Carter v. Gibbs, supra*, 909 F.2d at 1455 ("[T]he question here is not whether the CSRA implicitly repealed section 16 of the FLSA; it is whether an additional exception to CSRA section 7121(a)(1)'s exclusivity provision should be implied").

Moreover, the CSRA's preemptive effect is not limited to claims arising from disputes between a federal employee and his employer. On the contrary, it precludes jurisdiction over claims by federal employees against their union. For instance, a federal employee cannot sue his union in court for breach of its duty of fair representation, since the Act makes that claim actionable as a ULP within the exclusive jurisdiction of the FLRA. *Karahalios v. NFFE Local 1263, supra*, 109 S.Ct. 1282. Nor can federal employees bring malpractice claims against union attorneys into court, as such actions are also precluded by the CSRA's unfair labor practice procedures. *Montplaisir v. Leighton, supra*, 875 F.2d at 3-5.

We submit, therefore, that the court of appeals' decision fundamentally conflicts with the firm edict of this Court, as interpreted by a majority of the circuits, to

view the CSRA as the controlling authority on federal employee labor claims and to treat its remedial scheme as exclusive. By eschewing the CSRA remedies in this case, the Fifth Circuit's decision seriously undermines the meticulously crafted congressional scheme for federal sector labor relations.

CONCLUSION

The petition for a writ of certiorari should be granted.

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